STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRUCE ALLEMAN, Appellant, and STATE OF IOWA (DEPARTMENT OF REVENUE & FINANCE), Appellee.	)	CASE NO. ~~95~~ 96-MA-10

DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellant's petition for review[1] of a proposed decision and order issued by a PERB administrative law judge in which the ALJ proposed that the State's motion to dismiss the underlying state employee disciplinary action appeals be granted due to their untimely filing with PERB.

Oral arguments to the Board on review were heard on June 5, 1996, John O. Haraldson appearing for Appellant and Michael R. Prey for Appellee. Pursuant to section 17A.15(3)[2], on our review we possess all powers which we would have had had we elected, pursuant to PERB rule 621-2.1 [621 IAC 2.1(20)], to preside initially in place of the ALJ.

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[1]Although denominated as a notice of appeal and purportedly filed pursuant to 621 IAC 9.2(20), we treat the matter as if it had been correctly labeled as a petition for review pursuant to 621 IAC 11.8(19A, 20).

[2]This and all subsequent statutory citations are to the Code of Iowa (1995).

FINDINGS OF FACT[3]

Appellant is employed by the State at the Department of Revenue & Finance in the classification of Public Service Supervisor 2. On July 27, 1995, he was disciplinarily suspended for two days due to his alleged failure or refusal to follow his supervisor's instructions. Appellant promptly appealed the discipline to the director of the Iowa Department of Personnel (IDOP) pursuant to section 19A.14(2).

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[3]In his petition for review Appellant requests that we consider the "supporting evidence" attached to his brief, which consists of a letter to Appellant's counsel from a postal supervisor and Appellant's own affidavit, with attachments. Neither were submitted to the ALJ, nor in any other way incorporated into the agency record prior to the issuance of the ALJ's proposed decision.

When ruling on such requests to submit additional evidence in prohibited practice proceedings pursuant to section 20.11, we have previously applied the section 17A.19(7) standard used by the district courts when considering a party's request to submit additional evidence in judicial review of agency action proceedings. See PPME and Ida County, 94 PERB 5037. We believe the standard is also appropriately applied to requests that we consider additional evidence on review of ALJ proposals in grievance and disciplinary proceedings pursuant to section 19A.14.

While this standard justifiably presents a substantial obstacle to the presentation of additional evidence in the typical case, thus placing the onus on the parties to make a complete record before the ALJ, we think it has been met under the unique circumstances of this case. We believe portions of Appellant's requested submissions to be material to the issues presented, and that Appellant's failure to present them to the ALJ should be excused due to the nature of the notice of hearing on the State's motion which the ALJ issued. That notice did not advise the parties that they would be afforded the opportunity to present relevant evidence, but instead indicated only that the hearing's purpose was to hear oral arguments concerning the motion. Believing that Appellant cannot reasonably be faulted for failing to present evidence when he was never notified he would be afforded the opportunity to do so, we grant Appellant's application and have received and considered the proffered additional material as part of the record in making our factual findings.

On August 18, 1995, while the appeal of the two-day suspension was still pending before the IDOP director, Appellant was again disciplinarily suspended, this time for five days, due to another alleged refusal to follow supervisory instructions. Appellant likewise appealed this action to the IDOP director, and was told by IDOP personnel that the IDOP proceedings on both suspensions would be combined.

Ultimately, on December 27, 1995, after various communications between Appellant and IDOP personnel, a designee of the IDOP director issued the director's response to the appeals, upholding both suspensions.[4]

On Friday, January 26, 1996, the thirtieth day following issuance of the IDOP response, Appellant's counsel mailed an envelope to PERB by depositing it in a U.S. Postal Service collection box in West Des Moines. The envelope bore postage and PERB's address, and contained two state employee disciplinary action appeal forms (one for each suspension) which Appellant had signed the previous day, together with a number of attachments.

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[4]Appellant has maintained, and the ALJ found, that no response to Appellant's appeal of his first (two-day) suspension was ever issued by IDOP. We find otherwise.

The IDOP director's December 27 response is in some respects confusing, in that it bears only the IDOP identifying numbers for the first suspension (96-0045; NC-446) but states the issue involved in terms of only the second suspension. However, the IDOP response sets forth facts surrounding both the first and second suspensions as well as the employer's asserted grounds therefor, and concludes that ". . . the suspensions should be upheld." We find that the December 27, 1995 response of the IDOP director's designee, when considered in its totality, constituted a response to both of Appellant's appeals within the meaning of section 19A.14(2).

Although the scheduled pickup times for mail deposited in that collection box is not of record, Appellant's counsel's affidavit indicates that the mailing to PERB was deposited in the box during the afternoon of January 26, but prior to the posted pickup time for that day.

The mail deposited in the collection box utilized by Appellant's counsel was not, however, picked up by the Postal Service on that date (or on the following day) due to a severe winter storm which had struck the Des Moines area on January 26 and had made travel hazardous and difficult.

As did the ALJ in his proposed decision, we take official notice of the fact that although a number of State offices were directed to close at 2:00 p.m. on January 26 due to the inclement weather, PERB received no such direction and remained open that day until the conclusion of its regular business hours at 4:30 p.m.

On Monday, January 29, 1996, having discovered that Appellant's mailing had not yet reached PERB, Appellant's counsel personally delivered copies of the mailed documents to PERB's offices at 4:17 p.m.

Appellant's January 26 mailing to PERB was postmarked by the U.S. Postal Service at Des Moines on January 29. The mailing itself was delivered to PERB's offices by the Postal Service on January 31, 1996.

Following the joint docketing of the appeals as PERB Case No. 95-MA-10 and their service upon IDOP pursuant to PERB subrule 621-11.2(4), the State filed the instant motion to dismiss, asserting

that the appeals were not timely filed and that PERB was thus without jurisdiction to adjudicate them.

CONCLUSIONS OF LAW

Section 19A.14(2) provides, in relevant part:

> 2. *Discipline resolution.* A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may . . . appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
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> If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee....

The 30-day period prescribed by this section for the filing of appeals to PERB is mandatory and jurisdictional. See, e.g., Gammon/State (DHS), 89-MA-01. Cf. Brown v. PERB, 345 N.W.2d 88, 93 (Iowa 1984)("[W]e have clearly held that this type of statute limiting the time for filing a complaint with an administrative agency is mandatory and not merely directory.")

The filing of a state employee grievance appeal to PERB is a request for PERB's commencement of a contested case proceeding within the meaning of Iowa Code chapter 17A. The manner and time of such a request's "filing" is specified by section 17A.12(9) which provides, in relevant part:

> . . . a person's request or demand for a contested case proceeding shall be in writing, delivered to the agency by United States postal service or personal service and shall be considered as filed with the agency on the date of the United States postal service postmark or the date personal service is made.

Section 17A.12(9) thus presents a state employee with a choice involving both costs and benefits: if the employee desires the certainty of immediate "filing," he or she must see that the appeal is personally delivered to PERB; if, on the other hand, the employee desires the convenience of mailing, he or she must be willing to defer "filing" until the postal service's postmark has been applied.

Section 19A.14(2), by prescribing a specific period for the commencement of such proceedings, is appropriately viewed, in part at least, as a statute of limitation.

> In the construction of a statute of limitations general words are to have a general operation, and the statute is not to be subjected to judicial exceptions, arising from a supposed equity; the courts cannot engraft on the statute exceptions or qualifications not clearly expressed in the statute itself or clearly established by judicial authority. Exceptions in the statute are strictly construed and are not enlarged on by the court on considerations of apparent hardship or inconvenience. (Citations omitted.)

54 C.J.S., Limitations of Actions §6, p. 28.

Courts have, however, recognized certain implied exceptions to statutes of limitations, such as in the case of war, as a result of which courts may be closed to certain parties. See generally 51 Am.Jur.2d, Limitation of Actions §§139, 140. The Iowa Supreme Court, among many, has recognized that late filing may be excused under the "discovery" and "misrepresentation" exceptions, neither of which has applicability in the instant case. See, e.g., Brown v. PERB, supra, 345 N.W.2d at 95-6.

> While most courts give recognition to certain implied exceptions . . ., it is now conceded that they will not, as a general rule, read into statutes of limitation an

> exception which has not been embodied therein, however reasonable such exception may seem and even though the exception would be an equitable one. The modern rule of construction in this respect is that unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, it must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto. Undoubtedly a hardship will result in many cases under this rule, but the court may construe only the clear words of the statute, and if its scope is to be enlarged, the remedy should be legislative rather than judicial. (Citations omitted.)

51 Am.Jur.2d, Limitation of Actions §138, p. 708.

Some courts do nonetheless appear to take a liberal view toward the existence of implicit exceptions to statutes of limitation. See, e.g., Elkins v. Derby, 525 P.2d 81 (Cal.S.Ct. 1974); Bollinger v. National Fire Insurance Co., 154 P.2d 399 (Cal.S.Ct. 1944); Lewis v. Superior Court, 220 Cal.Rptr. 594 (Cal.App. 1985). The Iowa Supreme Court does not appear to do so, however, having indicated that "[w]hile courts may not look with favor upon a defense of statute of limitations, it is also true that where no exception or exemption is found in a statute of limitations no such exemption or extension exists." Willow Tree Investments, Inc. v. Wilhelm, 465 N.W.2d 849, 851 (Iowa 1991); Rohrig v. Whitney, 234 Iowa 435, 438, 12 N.W.2d 866, 868 (1944).

The IDOP director's response was issued December 27, 1995. Computing time in accordance with section 4.1(34), Appellant's appeals to PERB had to be "filed" in a manner specified in section 17A.12(9) on or before Friday, January 26, 1996.[5] Appellant

[5]Since we have found that an IDOP response to both grievances was in fact issued on December 27, 1995, it follows that the limitations periods for both appeals commenced and ran

accomplished neither method of "filing" on or before that date since both the personal service of the appeals and the postal service's postmarking of the mailed appeals occurred on Monday, January 29, 1996.

Appellant argues that the filing of his appeals was delayed by the inclement weather which prevailed in the Des Moines area on the final day of the jurisdictional filing period--a matter beyond his control--and that his filing should thus be considered timely. Now recognizing that alternative methods of filing were available to him, Appellant argues that by the time the preparation of his appeal forms and attachments was completed on the afternoon of January 26, the weather was such that personal delivery to PERB "would have been impossible," and that but for the weather, his mailing would have received a January 26 postmark, rendering it timely.[6]

In order to avoid the bar of the statute of limitations, Appellant must establish a sound factual and legal basis for being excepted from the requirement that his appeals be filed within 30

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simultaneously. Because of this conclusion it is unnecessary for us to address certain arguments, perhaps best characterized as claims of an equitable estoppel, which Appellant has raised in response to the ALJ's proposed conclusion that the section 19A.14(2) limitations periods applicable to the two appeals expired on different dates.

[6]We note that nothing in the record before us supports the repeated assertion that mail deposited by mid-afternoon in the collection box which counsel utilized will be postmarked by the postal service on that date. Although Appellant cites the postal supervisor's statement in support of the proposition, the document itself is totally silent as to the postal service's postmarking practices. Nor does counsel's affidavit speak to the postmark issue.

days following the IDOP response. See Brown v. PERB, supra, 345 N.W.2d at 94.

Although reasonable minds might disagree as to whether a sound factual basis for an exception exists under the circumstances of this case, even if we were to conclude that one did we are unable to conclude that a sound legal basis exists.

While Appellant cites many reported cases in the presentation of his argument, none support the existence of an implicit "inclement weather" exception to a jurisdictional limitations period, nor have we located any case where a court or agency has implied such an exception. We are not dealing here with a filing requirement created by an agency or court rule, which might be tolled by timely service of the documents to be filed. See Estate of Morgan v. North Star Steel Co., 484 N.W.2d 199 (Iowa 1992). Nor are we presented with circumstances where filing was impossible due to the abnormal closure of the forum in which the document was to be filed [see Johnson v. State Farm Mutual Auto Ins. Co., 241 So.2d 799 (La.App. 1970)], or with a situation where the statute or rule prescribing the limitations period is expressly subject to a "good cause for delay" exception. See Houlihan v. Employment Appeal Board, 545 N.W.2d 863 (Iowa 1996).

Instead, what we have is a mandatory and jurisdictional statutory requirement which, as applied in this case, required the filing of Appellant's appeals by one of the methods specified in section 17A.12(9) on or before January 26, 1996.

The General Assembly, in enacting section 17A.12(9), could have provided, had it intended to, that filing be deemed to have occurred upon mailing. It did not. Instead, it pegged the timeliness of the file-by-mail option to the date of the U.S. Postal Service's postmark. We think the clear result of the legislature's use of the language it in fact employed is that the risk of a delay in the postal service's processing of mail is upon the sender.

Nor do we feel free to imply an "inclement weather" exception to the personal delivery method of filing offered by section 17A.12(9). While the Iowa Supreme Court has referred to the possible reliance on "exceptional circumstances" to avoid a statute of limitations, during a discussion of the discovery and misrepresentation exceptions (see Brown v. PERB, supra, at 94), it has not to our knowledge detailed any other such exceptional circumstances, but has instead indicated its apparent adherence to the conservative majority view that exceptions, if any, must be found in the statute of limitation itself.

We consequently will not imply an "inclement weather" exception to the mandatory and jurisdictional requirement of section 19A.14(2). An administrative agency such as PERB may not enlarge its powers by waiving a time requirement which is jurisdictional or a prerequisite to the action taken. See, e.g., Iowa Civil Rights Comm'n. v. Massey-Ferguson, Inc., 207 N.W.2d 5, 10 (Iowa 1973).

> Statutes of limitation find their justification in necessity and convenience rather than in logic, and it

> has been said that they represent expedience rather than principles. . . . . Accordingly, the fact that the barred claim is a just one or has the sanction of a moral obligation does not exempt it from the statute of limitations. The statutes are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They apply with full force to the most meritorious claims, and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a case . . . . (Citations omitted.)

51 Am.Jur.2d, Limitation of Actions §19, pp. 603-4.

We conclude that Appellant has failed to establish a sound, recognized legal basis for being excepted from the timely filing requirement. Consequently, we enter the following

ORDER

The state employee disciplinary action appeals filed herein by Bruce Alleman are hereby DISMISSED.

DATED at Des Moines, Iowa this 12th day of July, 1996.

PUBLIC EMPLOYMENT RELATIONS BOARD

Richard R. Ramsey, Chairman

M. Sue Warner, Board Member

Dave Knock, Board Member